

Original

No.

1372

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

RICKEY LAND AND CATTLE COMPANY (a Corporation),

Appellant,

vs.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Appellees.

Appellant's Opening Brief.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Appellant.

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MAN, JOHN COMPSTON, J. C. MILLS,
A. W. GREEN, and SPRAGG-WOODCOCK
DITCH COMPANY (a Corporation),

Appellees.

APPELLANT'S OPENING BRIEF.

The essential facts of this case are as follows:

On June 10, 1902, Miller & Lux, a corporation organized under the laws of California, commenced an action in the United States Circuit Court for the Dis-

trict of Nevada against one Thomas B. Rickey and appellees herein, all citizens of the State of Nevada, to enjoin them from diverting water from the Walker River, a stream rising in the eastern part of the State of California and flowing into and through the western part of the State of Nevada, and alleged that said defendants were depriving said Miller & Lux from the use of water on its lands in the State of Nevada.

Said Thomas B. Rickey owned certain lands and water rights on the Walker River in the State of California and higher up on the stream than the lands of Miller & Lux in the State of Nevada.

On August 6, 1902, said Thomas B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, appellant herein, a corporation organized under the laws of the State of Nevada.

On October 15, 1904, the Rickey Land and Cattle Company, appellant herein, commenced two actions in the Superior Court of Mono County, State of California, against appellees herein and others, to quiet its titles to certain waters of the Walker River in the State of California, appurtenant and riparian to its lands in the State of California.

Summons was served on all the appellees herein and all the appellees herein appeared in said actions and filed general demurrers in said actions in Mono County, State of California, prior to the 28th day of December, 1904.

On the 5th day of January, 1905, the appellees herein filed cross bills in the original action against said Thomas B. Rickey and subpoenas *ad respondendum* issued on said cross bills were served on said T. B. Rickey on the 25th day of January, 1905.

On the 28th day of January, 1905, this action was commenced by appellees herein to enjoin said Rickey Land and Cattle Company from prosecuting said actions in Mono County.

Certain of the questions involved in this appeal were considered by this Court in the cases of the *Rickey Land and Cattle Company vs. Henry Wood et al*, and the *Rickey Land and Cattle Company vs. Miller & Lux et al*; numbered 1365 and 1366, respectively, which cases are now pending before the Supreme Court of the United States on petitions for writs of certiorari.

One question, namely, the jurisdiction of the United States Circuit Court for the district of Nevada in a local action over property and water rights wholly in the State of California, which is likewise involved in this appeal, was determined adversely to appellant's contention in the case of the *Rickey Land and Cattle Company vs. Miller & Lux*, No. 1366, and the question of the jurisdiction of the United States Circuit Court, in an action to enjoin the diversion of specific water from a stream, to entertain a cross bill filed by one defendant against a co-defendant in said action, both of whom were citizens of the same State, which is likewise involved in this appeal, was also determined

by this Court contrary to appellant's contentions in the case of the *Rickey Land and Cattle Company vs. Henry Wood et al*, No. 1365.

As both of these questions were discussed quite fully on those two appeals, we will not at this time venture to impose on your Honors with further lengthy arguments in support of the contentions thereunder, but there is one question of importance in this case that did not arise in the above cases and it thus differentiates the present case from the two above cases.

As will be observed from the above statement of facts, the summons was served and the defendants appeared in the actions commenced in Mono County prior to the filing of the cross bills or the issuing of any process on behalf of appellees herein, whereas in the case of the *Rickey Land and Cattle Company vs. Henry Wood et al*, the cross bill was filed and the subpœna served prior to the service of summons on Henry Wood *et al*, in the Mono County suit.

It is the contention of appellant that there is no conflict of jurisdiction between the suits commenced by appellant in Mono County, California, and the proceedings under the cross bills filed by appellees in the action of *Miller & Lux vs. Rickey*, filed in the United States Circuit Court for the district of Nevada. Appellant's contention is that the action commenced in Nevada had as its subject matter property located exclusively within the State of Nevada. That, the action being local, the jurisdiction of the court in that action

was limited to a subject matter lying within the territorial limits of the district of Nevada. Likewise as to the actions in California which are actions to quiet title to real property situated in California. These actions, being local, the jurisdiction of the court therein is confined exclusively to the subject matter located within the State of California. Thus the jurisdiction in the Nevada actions is confined to a subject matter in the State of Nevada, and the jurisdiction of the subject matter in the California actions is confined to the State of California, and there is no room or possibility for any conflict of jurisdiction. *Northern Indiana R. R. Co. vs. Michigan Central R. R. Co.*, 15 How., 233.

The fact that the subject matter of the action commenced in the court of the State of Nevada is an easement in a stream which flows through and out of the State of California into and through the State of Nevada cannot transfer that portion of the easement which is in the California part of the stream into the State of Nevada. Nor does the fact, that the lands, to which this easement is appurtenant, happen to lie in the State of Nevada, have the effect of transferring the locus of the easement in the California portion of the stream out from the State of California and into the State of Nevada. Nature fixes the location of the easement. It follows the stream. That part of the easement which is imposed upon the portion of the stream that lies in the State of Nevada is located within the State of Nevada, and that portion of the easement which is im-

posed on that portion of the stream which lies within the State of California is in the State of California. The fact that the lands to which that portion of the easement which is imposed upon the stream flowing in the State of California is appurtenant to lie the State of Nevada, can by no possibility transfer the locus of that easement out from the State of California into the State of Nevada, which seems to have been the theory of the Court below.

But assume that the fact that the easement in the stream is appurtenant to lands lying in Nevada has the effect to transfer the locus of that portion of the easement that is imposed upon the stream flowing in the State of California out from the State of California and into the State of Nevada, then that very fact would locate the subject matter of the action commenced in the State of Nevada entirely within the State of Nevada and outside of the territorial limits of the jurisdiction of the California court.

This very fact would render it impossible for there to be any conflict between the jurisdiction of the respective courts; the subject matter of one suit being confined to the State of Nevada, and the subject matter of the other suit being confined to the State of California; thus the subject matter of the two controversies is distinct and different and the only basis for a conflict of jurisdiction does not exist.

The foregoing questions were argued somewhat elaborately in the above-referred-to appeals, wherein many cases were cited to support appellant's contentions.

But in the present case, for the purposes of argument, assuming that somehow there is a conflict between the jurisdiction of the court of the State of Nevada and the court of the State of California, in these respective actions, still there is a well settled rule that

“Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it, holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted. * * * It is maintained as a principal of universal jurisprudence that where a jurisdiction has attached to a person or thing, it is, unless there is some provision to the contrary, exclusive in effect until it has wrought its function.” *Taylor vs. Taintor*, 16 Wall., 366-370.

“The rule is that the tribunal which first acquires jurisdiction of a cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to Federal and State courts, being the outgrowth of necessity, is a principle of right and of law which leaves nothing to the discretion of a court and may not be varied to suit the convenience of litigants.” *Merritt vs. Steel Barge Co.*, 24 C. C. A., 530-534, 79 Fed., 228-231.

In the present case, from the facts as stated in the record, it appears that the jurisdiction of the California court completely attached on or before December 28, 1904, prior to which time appellees had not alone been served with summons, but had appeared and filed a general demurrer in the actions commenced in Mono County, and thus affirmatively waived any objection to the jurisdiction of the California court. Later, after this waiver and consent on the part of appellees and after the jurisdiction of the California court had thus fully attached, the appellees, on the 5th day of January, 1905, filed cross bills against Thomas B. Rickey in the action commenced by Miller & Lux in the United States Circuit Court for the district of Nevada, on June 10th, 1902, and then, on the theory that the fact that the Rickey Land and Cattle Company purchased its lands and waters in California from Thomas B. Rickey gave the Nevada court jurisdiction under the cross bills over a controversy concerning said lands and waters in California between appellees and said Rickey Land and Cattle Company, it is contended that a conflict of jurisdiction has resulted between the United States Circuit Court for the district of Nevada, proceeding under the cross bills of appellees, and the State court of California, proceeding under the actions brought by appellant in Mono County. From the above authorities it is plain that, as the jurisdiction of the State court of California had completely attached, at least a week prior to the initiation of any proceedings in the Federal court,

assuming that there was any conflict of jurisdiction, it is the Federal court that should stay its hand, until the conclusion of the proceedings previously initiated in the State court.

As was said in the case of *Rogers vs. Pitt*, 96 Fed., on page 670,

“The general rule is well settled that where different courts have concurrent jurisdiction, the court which first acquires jurisdiction over the parties, the subject matter, the specific thing, or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule, the comity of the courts, National and State, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision, between the courts, which might bring about injurious and calamitous results. This rule is elementary, and the citations under all the authorities in its support would be endless and useless.”

Here follows over a half page of authorities.

Appellees' counsel in the court below conceded the foregoing authorities to correctly state the law, but

sought to differentiate them from the present case by arguing that while the controversies initiated by the filing of these cross bills were not brought before the court by the original bill filed by Miller and Lux against T. B. Rickey *et al* in the United States Circuit Court for the district of Nevada, yet they lay potentially within the jurisdiction of the court under that original bill. That is to say, that upon the filing of the original bill by Miller and Lux, the court in Nevada acquired a kind of potential jurisdiction that enabled it to embrace and take in all these other controversies that were thereafter sought to be initiated by the filing of these cross bills. Thus it was argued that the subject matter of the action brought in the Nevada court by Miller and Lux against appellees and Thomas B. Rickey included not alone the controversy between Miller and Lux and the defendants in that action, but included all controversies that might be thereafter begun and litigated between the defendants themselves in that action by the filing of cross bills against each other. The first jurisdiction, namely, that of the controversy between Miller and Lux and the defendants in that action, existed actually, and the jurisdiction of the court in that action over controversies among the co-defendants prior to the filing of the cross bills, existed potentially in the court in that action.

Thus at the time the suits were filed and the summons was served and the defendants appeared in the actions in Mono County, while as yet no actual con-

troverſy had been initiated between appellees and Thomas B. Rickey in the action commenced in the State of Nevada, yet, as the Nevada court in that action had potential jurisdiction over ſuch controverſy, the filing of the actions in Mono County cauſed a conflict between the jurisdiction of the two courts to ariſe.

If this argument is correct, the fact that the cross bills were filed by appellees becomes immaterial.

The conflict in jurisdiction aroſe immediately upon the filing of the actions in Mono County againſt appellees and the fact that later appellees decided they would like to have the Nevada court proceed and try this controverſy has no weight in this caſe.

If this argument is correct, appellees need not have filed the cross bills, but could have proceeded and brought this action to enjoin the proſecution of this ſuit in Mono County on the ground that the jurisdiction to decide this controverſy already lay potentially in the Nevada court. It is true that they might not care to file the cross bills and to invoke that jurisdiction and cauſe theſe controverſies to be tried in the Nevada court, yet they had the power to ſtop appellant from initiating this controverſy himſelf in the courts of the State where all of his property lay, which were the only courts that had jurisdiction to grant him a decree eſta- bliſhing his property rights.

The foregoing argument is obviously futile. Appellees filed theſe cross bills for the purpoſe of laying a foundation for an action to enjoin the Rickey Land

and Cattle Company from prosecuting its actions in Mono County. They, nor no one else, would or could dream of the possibility of enjoining these actions commenced in Mono County unless it be shown in some manner that the same controversies existed and were in the process of determination in the Nevada court. Thus the cross bills were filed in the Nevada court in order that a controversy might exist in the Nevada court between appellees and the predecessor in interest of the Rickey Land and Cattle Company. It followed then, they argue, that when a controversy existed between appellees and Thomas B. Rickey, in the Nevada court over the waters of the Walker River, and the controversy existed in the California court between the Rickey Land and Cattle Company and appellees over the waters of the Walker River in the State of California, there arose a conflict of jurisdiction between the courts sitting in the two States.

Assuming, without conceding the above argument to be correct, yet, as the cross bills in the Nevada court were not filed until some days after the jurisdiction of the California court had completely attached, by the service of summons and the appearance of the parties, under the rules heretofore cited it is the Nevada court that should stay its hand, and not the court of the State of California.

The Rickey Land and Cattle Company had a right to have its water titles in the State of California quieted and established. This the court of the State of Nevada

could not do, as the property of the Rickey Land and Cattle Company lay wholly in the State of California. *Conant vs. Irrigation Co.*, 23 Utah, 628.

Under the very plain rule laid down in that case, supported by the multitude of decisions by the Supreme Court of the United States cited therein, Mr. Rickey could not, nor could the Rickey Land and Cattle Company as his successor in interest, have filed any cross bill or taken any action to quiet its titles in California against appellees in the suit pending in the State of Nevada. As appellees were lower down on the stream than Mr. Rickey and appellant herein, the only kind of a proceeding that he or appellant could have initiated against appellees, either in the action theretofore commenced by Miller and Lux against Mr. Rickey and appellees in the State of Nevada, or in an action commenced in the State of California, would have been a proceeding to quiet appellant's title, but as all of appellant's titles were located and lay exclusively within the State of California, any action to quiet these titles would have to be commenced in the State of California, which was, consequently, the only jurisdiction in which appellant could have initiated such an action.

Thus, if appellees' arguments are correct, the simple fact that Miller and Lux commenced an action against appellees and Thomas B. Rickey in the Nevada court was of itself sufficient to tie the hands of Mr. Rickey and his successor in interest, the Rickey Land and Cat-

tle Company, and effectually check the initiation of any controversy which could establish or determine the titles to appellant's property in California as against appellees.

Thus it is manifest that this argument, based on the so-called potential jurisdiction that existed in the court of Nevada in the action commenced in the State of Nevada by Miller and Lux against appellees and Thomas B. Rickey over controversies between appellees and the Rickey Land and Cattle Company, is insufficient. The respective rights of the parties herein are to be determined, not by potential jurisdiction, but by actual jurisdiction. The court that first has actual jurisdiction over the subject matter in a controversy should be permitted to hold that jurisdiction until the controversy has been determined. The court has potential jurisdiction over any controversy over which it may have actual jurisdiction after suit is brought. The test is the actual exercise of jurisdiction over a controversy in a court and not the power of the court to exercise jurisdiction in a controversy that may, or may not, be initiated. The court that first actually exercises jurisdiction over a controversy is the one that shall continue to exercise that jurisdiction without interference.

Any two courts having concurrent jurisdiction have potential jurisdiction over all controversies over which they have concurrent jurisdiction, but it has never been argued that this potential jurisdiction existing in a

court until it has become actual by the initiation of a controversy is any basis for an injunction prohibiting any controversy being decided in another court having jurisdiction thereover where the proceedings in the latter court were initiated first and where the latter court first actually acquired complete jurisdiction over the controversy by the service of process or the appearance of parties.

The precise question here at issue was determined in the case of *Rogers vs. Pitt*, 96 Fed., 668-673. In that case the original action was brought in the State court in the State of Nevada to determine a controversy between Pitt and Markers, Rogers' predecessor, over rights to the water flowing in the Humboldt River.

While the action was pending in the State court, Rogers, a citizen of the State of California, purchased the property from Markers. Rogers then brought an action in the United States Circuit Court to determine a controversy over the same waters between himself and Pitt. He did this before Pitt took any step in the State court to make Rogers a party to the proceeding then pending in that court. After Rogers invoked the jurisdiction of the Federal court, Pitt proceeded to make Rogers a party to the action theretofore pending in the State court, as the successor in interest to Markers, and Rogers then brought this proceeding in the United States court to enjoin Pitt from prosecuting the action in the State court as against Rogers.

In this case the potential jurisdiction of the State court over the controversy between Rogers and Pitt was absolutely clear. The property purchased by Rogers from Markers was the very subject matter of the suit pending in the State court.

The transfer of this property from Markers to Rogers could not take it out of the jurisdiction of the State court in the action pending between Pitt and Markers at the time of the transfer. A sale of property over which a court has jurisdiction was never known to oust the court of jurisdiction over the property. Thus in this case the State court had actual jurisdiction over the property, and over the controversy concerning the property, prior to the initiation of the action in the Federal court. But the sale of Markers to Rogers seems in a way to have abated the action in the State court until Rogers was made a party thereto. Thus it was held that when Rogers brought the action against Pitt in the Federal court and served the process, the Federal court was the only court that actually had full and complete jurisdiction over the controversy. That being so, the Federal court having full and complete jurisdiction over the controversy between Rogers and Pitt, whereas up to that time the jurisdiction of the State court in the action pending between Pitt and Markers, Rogers' predecessor, was only potential, as to Rogers, and dependent upon Pitt's initiating proceedings in the State court to make Rogers a party to that action, the actual jurisdiction in the Federal court

was held to have precedence, and Pitt was enjoined from proceeding any further in the State court. The reasoning of Judge Hawley on the foregoing premises is as follows:

“It is, of course, true that there was at that time a suit pending in the State court in which steps could have been previously taken that would have invested that court with full jurisdiction to hear and determine the merits of this case. It is not, however, what might have happened,—what steps might have been taken,—but the pivotal question is, what was the condition at that time under the steps that had been taken. This, it seems to me, is the true test to be applied to the facts set forth in this petition.”

The foregoing rule is truly applicable to this case. In this case it may be true that had appellees filed their cross bills and served process thereon in the action pending in the Nevada court before the complaints were filed and the process was served upon appellees in the California court, that the Nevada court would have jurisdiction over the controversy, but, as Judge Hawley said,

“It is not what might have happened,—what steps might have been taken,—but the pivotal question is, what was the condition at that time under the steps that had been taken.”

The condition at the time the cross bills were filed was that theretofore the actions had been commenced in the California courts and the process thereon had been served and the defendants therein had appeared and submitted themselves to the jurisdiction of the court.

This brings us to another phase of this controversy. The fact that, prior to the filing of the cross bills to the action in the Nevada court, appellees appeared and submitted themselves to the jurisdiction of the California court amounted to a waiver on the part of appellees to object to proceedings in the California court on the ground that the same were in conflict with proceedings afterward initiated by themselves on the cross bills filed in the Nevada court. On this proposition also the case of *Rogers vs. Pitt, supra*, is distinctly in point. Judge Hawley there said,

“Whatever the rights of defendants may have been at the time of the institution of the suit in this court, if they had taken proper steps to stay the proceedings in this court as a matter of comity between the State court and this court, it is clear to my mind that by coming into this court after service of process upon them and submitting themselves to its jurisdiction, they waived their rights to have the case tried in the State court.”

Wherefore, we respectfully submit:

First, That there exists no conflict of jurisdiction

between the California court and the United States Circuit Court for the district of Nevada by virtue of these actions, by reason of the fact that the subject matter of the action brought in the State of Nevada lay wholly within the State of Nevada, and the subject matter of the action brought in the State of California lay wholly in the State of California, and therefore there was no room for any conflict in jurisdiction.

Second, Assuming that there is a conflict of jurisdiction between the court of Nevada, under the cross bills filed by appellees, and the action commenced in the State court of California by appellant; yet we contend that as the process in the action commenced in the California court was served and the appellees appeared therein prior to the filing of the cross bills or the initiation of any proceedings in the Nevada court, that the California court first acquired complete jurisdiction over the controversy between appellant and appellees and is entitled and should be permitted to retain that jurisdiction to the end of the litigation without interference by any other court.

Wherefore, we respectfully submit that the Circuit Court erred in enjoining the appellant herein from prosecuting the said actions in Mono County.

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CHAS. C. BOYNTON,
Solicitors for Appellant.

